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# FEDERAL

Department Editor: Charles T. Lloyd\*

## IDENTIFICATION OF AIR MAIL SUBSIDY AND ITS EFFECT ON AIRLINE COMMUNITIES\*\*

ADDRESS BY EDWARD C. SWEENEY†

**O**UR 16 domestic trunk and 17 operating feeder airlines today link over 600 metropolitan and smaller cities by a complex air service network which provides this country with the finest commercial air transportation system anywhere in the world. These carriers render frequent, fast, air passenger, cargo and mail services which dissolve distances and tie our widely separated communities together in a manner essential to our modern commercial enterprises and military preparedness. The U.S.-flag international carriers render the same service to all accessible countries of the world.

This great air transportation system could not have been brought to its present development without the energetic management of the private airlines themselves, both certificated and otherwise. It has also been due to the support of the American taxpayer provided by the farsighted policies adopted by the Congress in passing the Civil Aeronautics Act of 1938. In addition to the provision of air navigation facilities, the 1938 Act recognized the quasi-public character of certificated air service, and authorized the payment of direct, albeit concealed, Federal aid through air mail payments.

The Civil Aeronautics Board has interpreted the 1938 Act to authorize it to fix air mail pay at amounts sufficient to meet the legitimate financial needs of the certificated air carriers, provided they operate with economy and efficiency. In brief, the Board has taken the total recognized expenses of each carrier, plus a fair return on investment, and subtracted commercial revenues. The resulting deficit or "need," past or future, has then been fixed as the proper air mail payment.

While everyone appreciates the importance of this great air transportation system both in peace and in times of a national emergency, some members of Congress have questioned the increasing expense to the Federal Treasury of this "cost-plus" policy. While the airlines have reduced the unit cost of carrying mail since 1941, notwithstanding general price increases, a rapid and alarming increase in total mail pay took place immediately after the war. For the fiscal year 1946, mail payments to our domestic, international, and territorial carriers, including Alaska, totaled \$44.2 million. This sum increased to \$117.2 million for services rendered in the fiscal year 1949, and an estimated \$119.3 million for the year ended last June 30.

During these same postwar years more mail was carried to more cities and, with airline costs soaring, the unit cost to the Post Office Department

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\*\*Revised paper delivered before Annual Convention of National Association of State Aviation Officials at Minneapolis, Minn., October 3, 1950. This paper elaborates the article by Senator Edwin C. Johnson, "Proposed Senate Action on Air Mail Subsidies." 17 J. A. LAW & COM. 253 (1950).

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also advanced. Even for the established carriers the unit mail rate more than doubled, although never approaching the prewar rate, in terms of the ton-mile yardstick. The average yield from mail to the 16 domestic trunk carriers rose from 55 cents to \$1.17 per mail ton-mile between the fiscal years 1946 and 1949.<sup>1</sup>

#### WHAT IS SUBSIDY?

At the outset it should be evident that the entire air mail bill is not a subsidy. The domestic airlines rendered a valuable postal service in carrying over 41,000,000 ton-miles of mail in 1949. There is no dispute that they should be paid a just and reasonable amount covering the cost of rendering this service. However, the initial vexing difficulty in the air mail subsidy problem is that no one in authority has advanced a satisfactory method of determining a fair compensatory air mail rate.

During the last few years, when various committees of the Congress asked specifically how much of the air mail pay was earned by the carriers and how much was subsidy to meet their over-all financial needs, they were told that the Civil Aeronautics Act of 1938 did not require the Civil Aeronautics Board to separate subsidy from compensatory mail pay. The Civil Aeronautics Board has always had authority to make this separation, but in its discretion has not done so. Last year, the Chairman testified that the Board was not in a position to do so until it could secure a special appropriation to conduct extensive preliminary studies. Estimates were made before the Senate Committee that the subsidy portion of total air mail pay ranged between 40 and 60 per cent. To some, this official position of the Board appeared like holding back from the public vital information which the Congress was entitled to have to judge the wisdom of the public expenditures involved. It gave competing forms of transportation a powerful propaganda tool.

The increasing demands for deficiency appropriations to cover the higher mail pay authorized by the Board continually brought the apparent mounting airline subsidies to the attention of Congress. This was intensified by the supporters of the Hoover Commission's recommendation to separate air mail pay from subsidy in the interest primarily of more rational postal accounting. The questions asked in Congress indicated that the members did not understand why, at a time when the air transport industry was enjoying phenomenal growth, with improved fast equipment, greater safety, and greatly increased passenger and cargo traffic, there should be need for greater public support. The answers were not convincing or satisfying.

#### JOHNSON COMMITTEE INVESTIGATION

Shortly after Senator Johnson of Colorado took over the Chairmanship of the Senate Interstate and Foreign Commerce Committee of the 81st Congress, he sponsored Senate Resolution 50, calling for an investigation of the operational efficiency and financial stability of the entire airline industry, as well as pending and equally grave problems affecting land and water forms of transportation. At that time many had suggested that the seeming uncontrolled expansion of air service following the war and the near financial collapse of some carriers was the fault of airline managements and the policies of the Civil Aeronautics Board.

As a result of these hearings in 1949, lasting over three months, at which witnesses from all branches of Government and industry testified, the need to find a method of establishing essential airline subsidies in a manner that

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<sup>1</sup> See appended Table of Air Mail Payments, 1940-1950.

would be understandable to the Congress emerged as a foremost economic issue confronting the Senate Committee with respect to its responsibilities to air transportation. The need to separate fairly and intelligently compensatory mail pay from subsidy is an essential adjunct.

The President of the United States has shown the same concern toward airline subsidies when he stated in his Budget Message in January 1950:

"The recent rise in total air-mail payments—to an estimated level of about \$125,000,000 in 1950—has made it increasingly important that the subsidy element be separately identified. I recommend, therefore, the immediate enactment of legislation to authorize the separation of subsidy payments from mail compensation."

The potential importance of the subsidy identification issue can perhaps be emphasized by mentioning that the U.S. certificated air mail carriers of all classes have on file with the Board petitions for increases in mail pay amounting to \$229 million for the calendar years 1944 through 1950.<sup>2</sup> This sum is over and above that which they had been paid up to May, 1950. It is doubtful if anyone believes that the carriers will be able to prove to the Civil Aeronautics Board the need for anything near \$229 million additional pay for services already rendered. But this contingent pending liability highlights the gigantic task and the large sums involved in disposing of the pending mail rate proceedings by the Civil Aeronautics Board. Judging in retrospect the economy and efficiency of each airline's operations in order to find its over-all financial needs is an essential part of each mail rate proceeding. It is a back-breaking task and accounts in part for the mounting backlog of undisposed mail rate cases for which the House Appropriations Committee this year severely criticized the Board.

#### COST METHODS OF FIXING MAIL PAY

Only a few "die-hards" in the aviation industry would probably still contend that some part of the \$119.3 million paid to all classes of certificated carriers during the past fiscal year was not in part a subsidy. However, some airlines, notably the "Big Four," urge that their share of mail pay contains no subsidy, and these carriers have received about 50 per cent of the domestic total. The CAB has called their current rates "service rates."

As the Post Office is the only customer, the mail rate cannot be set at its value to the Post Office in a free competitive market because the 1938 Act requires the Department to tender air mail to the certificated carriers and the latter to carry it at rates set by the CAB under conditions prescribed by the Department.

This highlights one of the most controversial issues in the entire subsidy problem; namely, the manner in which the cost of handling and transporting air mail should be determined in a service rate proceeding. Upon this issue the airline industry is divided, and government agencies and outside groups hold radically different views.

One view is reached if air mail is considered the primary service for which our entire airline industry is operated. In the early 1930's the mail service was so recognized by Congress. With such a premise one can logically contend that the entire operating cost of the airlines is a proper charge to the postal service, provided the passenger and cargo traffic pays its "added cost" and a little more, and thus reduces the cost to the Government below that of operating exclusive air mail planes.

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<sup>2</sup> Letters from Chairman, Civil Aeronautics Board, to Senator Edwin C. Johnson, May 16 and 18, 1950, Hearings on Departments of Commerce, etc., Appropriations for 1951 before the Subcommittee of the Senate Committee on Appropriations, 81st Congress, 2nd sess., Part 2, p. 1468.

A second view, vigorously advanced in some quarters, contend that mail, passenger and cargo services should be treated as co-equals, and that each of these services should share all joint or common expenses on the basis of some common denominator, such as the ton-miles of traffic carried. Our initial staff studies indicate that more than two-thirds (%) of total airline expenses constitute a true pool of common costs after all costs that can be identified directly or exclusively with the mail or one of the commercial services have been taken out. Such a unit allocation of joint costs in terms of units of traffic carried has been employed in many joint cost problems. However, when the full capacity of the aircraft is not used due to the limited commercial traffic potential and small mail poundage, regardless of the plane's size and schedule frequency, a traffic unit allocation of costs frequently produces "lopsided" and unpredictable results. The stand-by cost and value-of-service concepts have most appeal when the aircraft load factor is necessarily below the optimum consistent with adequate service.

A complete discussion of different views on cost methods requires the mention of another extreme treatment of the cost relationship between mail and the commercial services. This would be to treat the mail service on an added-cost or added-increment basis on the theory that the non-mail services now account for more than 85 per cent of the total tonnage carried. Apparently not even the Post Office Department suggests this treatment. These differing views on the cost of the mail service have one thing in common: they are all three "cost methods." It is a policy decision to decide which one should be employed, if any, and the purpose thereof in a compensatory mail rate determination.

It was in respect to these problems that one year ago the Senate Committee engaged the services of Ernst & Ernst, an independent firm of accountants and management engineers, to make a limited "pilot" study of the standards and techniques that might be used in actually determining what the rates of mail compensation should be. The report submitted, as of last February 1, presented in condensed form the extensive consideration that this firm of engineers gave to the various cost allocation and practical problems involved.<sup>3</sup> The report has been most helpful and provocative to those that studied it carefully.

#### HOUSE COMMITTEE'S ACTION

The foregoing includes some of the cost problems that the House Interstate and Foreign Commerce Committee has apparently been wrestling with during this session of Congress in considering specific legislative proposals dealing with how the compensatory rate for the transportation of mail should be established. Recently the House Committee reported favorably the Heselton bill, H. R. 9184, by a vote of 15 to 2. This bill would require the earned mail rate to be based on cost alone. The Committee apparently did not accept the arguments presented by the airline industry with respect to the arbitrary character of all cost allocations or the historical use in transportation legislation of the value-of-service concept when subsidies have not also been involved.

Shortly before the recent recess of this session of Congress the Rules Committee of the House granted a rule to limit debate on the Heselton bill, and thus prepared the way for it to be called up on the Floor for vote. This was not done, but it may be called up without further procedure when the Congress returns on November 27. On the merits of H. R. 9184, or the

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<sup>3</sup> See 17 J. AIR L. & COM. 86 (1950).

merits of arguments against it, it would not be proper for me to comment at this time.

#### SENATE COMMITTEE'S POSITION

The Senate Committee has made it clear by its actions that consideration should first be given to finding a satisfactory method for establishing and justifying whatever subsidies the air carriers properly require. The remaining technical issues can be solved in ample time by the proper authorities, as well as the peculiar international problems affecting our U. S.-flag international carriers.

This is premised on the assumption that the taxpayer is ultimately more concerned with understanding the why and the wherefore of airline subsidies than in what is a precise constitutional and fair earned mail rate. No one has suggested that the Federal government should seek to drive a hard bargain with the airlines in fixing a mail rate. The Committee's staff preliminary studies make it clear that no matter how the mail rate is fixed, the present airline service to over 600 cities by 33 carriers cannot continue without substantial federal subsidies. The Senate Committee has set out to understand the reason for this.

#### NATIONAL DEFENSE ASPECTS

In attempting to find an understandable basis for airline subsidies, the Committee first turned its attention to the importance of our commercial airline system to the national defense. The Civil Aeronautics Act of 1938 directed the Board to consider the national defense as well as the postal and commercial needs of the country in establishing our subsidized air transportation system. Last year, at the request of the Chairman of the Senate Committee, the Defense Department made a thorough study over many months of the true value of civil aviation to national defense. On January 30, 1950, the Under Secretary of Defense testified before the Senate Committee that his Department would not be justified in underwriting in the Defense appropriation any portion of airline subsidies; that the airlines, like the railroads and trucks, were vital to our economy and the national defense, but no more vital, and that it would be impracticable to fix, in terms of dollars, the amount of airline subsidy that could justly be charged as national defense.

At that time the Committee questioned this official stand, and now, in view of the way that Department called on and promptly secured the charter services of both the scheduled and irregular air carriers for the Korean airlift, it appears completely unrealistic. It may again be proper to ask the present Secretaries of Defense and of the Air Force to re-examine this negative stand. However, notwithstanding the Committee members' private convictions, the Senate Committee felt compelled to accept the official position stated last January by the military and to proceed to look elsewhere for whatever justifications may exist for airline subsidies.

#### SHORT HAUL COSTLY

Fortunately, the extended hearings held by the Senate Committee last year developed, perhaps unwittingly, what we now believe to be the fundamental justification of airline subsidies. An analysis of the testimony received revealed one common theme. It ran through the testimony of both airline industry and government witnesses. There was general agreement in their testimony that airlines carrying only long-haul business and serving

high-density cities could operate profitably without Federal subsidy. On the other hand, we were told time after time that route certificates requiring an airline to serve a large number of small cities with limited traffic potential and to carry predominantly short-haul traffic absorbed most of, and frequently all of, the profits earned by the long-haul high-density business.

The staff studies verified that this was the basic reason most subsidy is required; that the need for a subsidy increases almost directly in proportion to the number of poor traffic cities the airline must serve under its certificate of public convenience and necessity. Thus, the short-haul feeder lines operating over secondary traffic routes understandably have the greatest requirements for subsidy, while, on the other hand, the long-haul transcontinental carriers have the greatest opportunity to be free of subsidy requirements.

#### UNPROFITABLE CITIES THE BASIS OF SUBSIDY

The varying traffic deficiencies and short-haul character of the different routes which individual carriers have been certificated by the Civil Aeronautics Board to serve is clearly the basis of this kind of subsidy. This is not necessarily a reflection on the companies' management. The need for this subsidy is not ultimately within the control of the airline itself. The airline is a quasi-public utility which renders a common carrier operation over fixed routes for a fair return which is subject to regulation by the CAB. The subsidy really benefits the passengers, cargo shippers and mail patrons of the cities certificated to enjoy airline service who do not, or cannot, pay the full cost thereof. In other words, for one reason or another, some cities served do not generate or attract sufficient revenue to pay for the service their citizens enjoy.

Our preliminary staff studies showed that airline service rendered to well over two-thirds of all domestic cities served during the fiscal year 1949 was provided at a loss. When management economy and efficiency under CAB's scrutiny was up to "par," we found that the subsidy need of each carrier came squarely from the services rendered to unprofitable cities which the carrier's route certificates require it to serve.

The Chairman of the Civil Aeronautics Board, in his testimony on February 15, 1950, before the House Subcommittee on Transportation, impliedly recognized the community need of airline subsidies when he stated:

"Although paid to the carriers, this subsidy is not intended to aggrandize their profits; rather, it is paid to them so that they will be financially able to provide service to communities and localities which might not be able commercially, at least at the outset, to support a volume of service which initially may be in excess of the commercial demand for air transportation."

#### INTERIM REPORT OF SENATOR JOHNSON

In May of this year, Senator Johnson, as Chairman of the Senate Committee on Interstate and Foreign Commerce, appeared before the Senate Appropriations Committee and presented an interim report on "Separation of Air-Mail Pay from Subsidy."<sup>4</sup> This report recommended that federal support to each airline system, over and above just compensation for carrying the mail, should be specifically identified on a community service basis, and that the Civil Aeronautics Board should identify and justify these amounts in an annual request to Congress for appropriations to pay them.

To demonstrate what Senator Johnson recommended in this interim report, he explained the basis of airline subsidies which has been described

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<sup>4</sup> See 17 J. AIR L. & COM. 333 (1950).

above. He also presented a tabulation of the amount of the subsidy each airline community contributed during the fiscal year 1949. The computation of the amount of subsidy by airline communities was constructed by the staff with a generous compensatory mail pay rate and with the most reasonable allocation of total airline revenues and expenses to the cities served that the staff could devise from the public records available. Neither the allocation formula nor the amount of subsidy by cities were intended to be final. They were to illustrate this new approach to the subsidy identification problem.

The Chairman's interim report also pointed out that in order to perfect a station cost formula to satisfactory accuracy, a staff of competent industrial engineers and accountants would have to make a thorough cost analysis of airline operations based on original field studies. The CAB Uniform System of Accounts and its Manual are inadequate and are not designed for this purpose.

Competent engineers must get behind the public records and make on-the-spot time and motion studies of airline operations and station activities. Payrolls and station activities must be checked to ascertain the employees and the expenditures that can properly be charged directly to each station served. Finally, the Chairman pointed out that the engineers must find acceptable methods of apportioning the remaining expenses and overhead of all categories over the stations of the entire system. This is a gigantic but perfectly feasible undertaking.

#### PROPOSED ENGINEERING SURVEY OF STATION COSTS AND SUBSIDY

The Senate Appropriations Committee accepted Senator Johnson's suggestion for his Committee to direct such a survey or audit leading ultimately to legislation separating air mail pay from subsidy for both domestic and U. S. international carriers. As a result, the 1951 General Appropriation Act contains \$200,000 for this purpose.

Interested parties were recently invited to submit bids to conduct such a survey covering domestic air carrier operations, including their international and overseas "stub" ends. Seven bids were received and after careful consideration and analysis of all the bids, Messrs. Ernst & Ernst were, on October 9, awarded the contract. A study covering international operations may logically follow when the Committee has considered the scope of the additional problems involved.

Bidders were instructed by the invitation to bid that the Committee would require them to develop the community approach to subsidy identification presented in the Chairman's interim report insofar as it related subsidy requirements to the losses incurred for the communities served. They were advised that they would not be expected to adopt any of the allocations used in the staff's study for the Chairman's interim report.

Ernst & Ernst will develop and report to the Committee the most accurate and practical techniques and methods of constructing profit and loss statements by individual airline stations which can be developed both through accounting and an engineering analyses of airline operations. This will include, as an appendage, the apportionment of an amount representing the rate of return on investment as found by the CAB. The final product will be the ultimate profitability of each station to the airline's system after payment of taxes.

Subsidy requirements would be allocated to the loss stations or developed from the station profit or loss statements. The importance of the small cities to the metropolitan hub as the origin and destination of a substantial portion of the latter's traffic is not to be overlooked in the contractor's study.



This will be considered in analyzing the proper cost and subsidy allocation formulas to be used in the station profit or loss statements.

The comprehensive field studies will include visits to the headquarters of each airline and to representative airline stations. On-the-spot analyses will be made by engineers, as required for the survey, of the records and operations at the headquarters and at stations of each of the 33 airlines to be surveyed. The invitation suggested the advisability of developing the station profit or loss statements by separate types of service. This has been found impracticable on a retroactive basis within the time available, and to make the engineering field studies fully productive, the contractor will develop, to the extent practicable through his field studies, ways of making such determinations in the future, giving particular attention to costs that can be directly identified through time checks with the separate types of traffic or services.

Finally, the contractor will recommend revisions in the CAB Manual of the Uniform System of Accounts insofar as this will help the preparation of the station profit or loss statements. His final report will represent revisions of the accounts, formulae and procedures to facilitate the annual preparation of profit and loss statements showing the ultimate profitability of individual airline stations and the identification of subsidy requirements in relation thereto.

Further, in order to give the Congress and the airline industry something concrete with which to judge the merits of the contractor's recommendations, he has been directed to prepare accurately individual profit or loss statements for the approximately 1,000 airline stations served during 1949, which statements would be based on the contractor's recommended methods. It is possible some detailed data may have to be estimated in order to meet the contract deadline of February 28, 1951.

So that this contractor would not dissipate his energies in trying to ascertain the precise cost of carrying the mail, the "Invitation Bid" listed certain compensatory mail rates to be used in this survey—60c,<sup>5</sup> 70c,<sup>6</sup> and \$1.00<sup>7</sup> per mail ton-mile, with a minimum poundage prescribed for smaller carriers. This should not be construed to mean that the Committee has determined the proper compensatory mail rates. These rates were given solely to provide the proposed contractor with a necessary premise so that he could proceed directly with the tremendous task outlined for him.

#### EFFECT ON COMMUNITIES OF SUBSIDY IDENTIFICATION

Senator Johnson has stated without equivocation that the community approach to subsidy identification he recommends does not provide that Federal subsidies should be paid by the cities. He has emphasized that the responsibility for underwriting whatever subsidy is found to be required will continue to be a Federal financial obligation, as it is the Federal government, acting through the Civil Aeronautics Board, that certifies the carriers and ultimately determines the adequacy of service over the routes.

It should be pointed out in this connection that this approach is premised on treating each airline as a separate operating system. This means that for cities enjoying airline service from more than one company, the profitability of each airline's service at that city must be determined separately. This has led to some misunderstanding.

To be more concrete, take City X, which is an excellent traffic generating center, and assume, that City X is served by four certificated carriers during

<sup>5</sup> "Big Four"—AAL, EAL, TWA, UAL.

<sup>6</sup> BAL, CAP, C&S, DAL, NAL, NWA, WAL.

<sup>7</sup> CAL, CAI, INL, MCA, NEA, and the seventeen feeder lines.

the year in question. One carrier is a large transcontinental carrier and one a feeder line. Each of the four carriers connects City G with different metropolitan terminals and intermediate cities. The traffic potential of the routes of each carrier differ substantially. Assuming the adequacy of each carrier's schedules this difference is shown by the records filed with the CAB giving the traffic enplaned at City X, as follows:

<i>Airline</i>	<i>Passengers (Numbers)</i>	<i>Mail (Tons)</i>	<i>Cargo (Tons)</i>
A	120,000	800	1,000
B	69,000	200	400
C	18,000	85	300
D	7,000	12	13

Assume, further, that the recommended method for determining individual station profit or loss when applied to the operations of the four airlines at City X show three of the airlines earned a total of one million dollars (Airlines A, B, and C), and the fourth carrier experienced a loss of \$50,000 (Airline D). In this event, no attempt would be made to apply the profits of the three airlines to offset the loss of the fourth. This could not be done and preserve the integrity of each airline as an operating entity.

Consequently, the appropriation justification which the Civil Aeronautics Board would present to Congress would probably show the results of each company's operation at City X, or at least that of the carrier operating at a loss. Thus, unless other subsidy factors are introduced, the Civil Aeronautics Board would ask Congress for a subsidy to underwrite the loss experienced at City X by the fourth airline (Airline D) to the extent this loss of \$50,000 was not offset by profits of the profitable cities served by this airline. Because of this offset balancing of the profits and losses at all cities served the request for subsidy for any city would ordinarily be for an amount less than the indicated station loss. In partial justification for a subsidy request, the enplaned volume of passengers, cargo and mail traffic could be presented.

The identification of the community subsidy requirement should not be construed as an adverse reflection on either the community or the airline but I would be less than frank if I did not recognize that such a presentation to Congress may contain implications which cannot now be foreseen.

#### CONCLUSION

It is the belief of the Chairman of the Senate Committee that when our contractor has devised a satisfactory method of distributing revenue and expenses of each airline to the communities served, the Congress will have done much to provide our vital and growing air transportation system with a sound financial basis.

The success of the survey will depend in a large measure upon the co-operation that each airline gives wholeheartedly to Ernst & Ernst and to the staff of the Committee. Every reasonable effort will be made to place the least possible burden upon the airlines' organizations.

If the system of identifying airline subsidies on a community basis is adopted, a sound air transportation system designed to meet the present and future needs of the commerce, postal service, and the national defense, can be developed with a clearer understanding of what the taxpayer is being asked to pay for. It will demonstrate to the public in a simple, understandable manner the nature and quantity of the air service patterns certificated by the Civil Aeronautics Board.

TABLE OF AIR MAIL PAYMENTS

Fiscal Year	Total Mail Payments		Average Yield per Mail Ton-Mile		
	Domestic, International Feeder, and Territorial <sup>1</sup>	Domestic Trunks	Feeders	Terri- torial	U.S. Inter- ntl.
1940	\$ 31,813	\$2.09 <sup>2</sup>	....	....	....
1941	36,257	1.88 <sup>2</sup>	....	....	....
1942	39,173	1.49	....	\$4.26	....
1943	27,391	.78	....	1.73	....
1944	31,253	.65	....	.67	\$1.48
1945	42,162	.57	....	1.35	2.26
1946	44,253	.55	\$17.22	2.95	3.75
1947	55,922	.76	38.75	4.64	2.88
1948	94,533	1.12	41.66	4.00	3.16
1949	117,218	1.17	28.34	2.26	2.85
1950 (est.)	119,308	1.09	28.66	3.25	2.82
<i>Calendar Year</i>					
1940	32,145	1.99 <sup>2</sup>	....	....	....
1941	36,360	1.73 <sup>2</sup>	....	....	....
1942	31,228	1.09	....	2.28	....
1943	28,023	.66	....	.67	1.82
1944	37,917	.64	....	1.00	2.15
1945	42,180	.51	....	1.28	2.31
1946	46,201	.64	28.16	4.79	3.69
1947	73,192	.89	41.94	4.17	2.81
1948	113,378	1.27	32.88	3.53	3.03
1949	117,306	1.11	29.34	3.53	2.88

<sup>1</sup> Mail payments reflect retroactive adjustments resulting from CAB mail rate orders issued and accepted through September 15, 1950. Alaska carriers not included until 1943.

<sup>2</sup> Yield for all domestic carriers. Source: Civil Aeronautics Board.

## 1950 REPORT OF AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON AERONAUTICAL LAW

THE Standing Committee on Aeronautical Law herewith submits its Report for 1949-1950. The Committee membership was increased from 5 to 7 members and that of the Associate and Advisory Committee was similarly expanded during the current year. The Associate and Advisory Committee has continued to function generally as if it were a part of the Standing Committee.

### ORGANIZATION OF CIVIL AVIATION AGENCIES<sup>1</sup>

In its last year's report the committee outlined briefly some of the outstanding recommendations of the Hoover Commission<sup>2</sup> on government organization of the civilian agencies dealing with aeronautics. Certain important organizational changes have been made.

In accordance with the recommendation of the Hoover Commission "that all administrative responsibility be vested in the Chairman of the Commission," the President, by authority of the Reorganization Act of 1949 (P. L. 109, 81st Cong., 1st Sess., June 20, 1949), submitted to the Congress Reorganization Plan No. 13 of 1950, dated March 13, 1950. (House Doc. 517, 81st Cong., 2nd Sess.) This Plan transferred from the Board to the Chairman of the Board (1) all of the executive and administrative functions of the

<sup>1</sup> See Sweeney, "Safety Regulations, etc.—Reorganization Plans of 1950," 17 J. AIR L. & COM. 269 (1950).

<sup>2</sup> See 17 J. AIR L. & COM. 99 (1950).

Board, including the hiring and dismissal of personnel, (2) the distribution of business among the personnel of the Board and among the administrative units of the Board, and (3) the use and expenditure of funds. In carrying out such functions, the Chairman is to be governed by "general policies of the Board and by such regulatory decisions, findings, and determinations as the Board may by law be authorized to make." Also, the appointment by the chairman of the heads of major administrative units is subject to the approval of the Board. The Board may revise budget estimates and determine upon the distribution of appropriated funds "according to major programs and purposes." The chairman is authorized to delegate functions vested in him to any officer, employee, or administrative unit. This Plan is now in effect.

In carrying out (substantially) another recommendation of the Hoover Commission, Reorganization Plan No. 5 of 1950 (House Doc. No. 509, 81st Cong., 2d Sess.) transferred all of the functions of the Administrator of Civil Aeronautics to the Secretary of Commerce and authorized him to delegate these functions to any officer, agency, or employee of the Department of Commerce. This action was a part of the general program, embodied in several of the 21 Reorganization Plans sent to the Congress in March, 1950, of vesting in the head of the Department all of the functions lodged within the Department. Heretofore, certain important functions were by statute vested in the Administrator although by a previous Reorganization Plan No. IV (effective June 30, 1940, Pub. Res. 75, approved June 4, 1940) the functions of the Administrator "shall be administered under the direction and supervision of the Secretary of Commerce." This Plan is now in effect and the Secretary of Commerce has delegated to the Administrator (whose position was not abolished as the Hoover Commission recommended) the functions formerly vested in him so that the Plan has, as a practical matter, made no change up to now except to clarify the chain of authority.

Also in line with the Hoover Commission's Report, the President increased the role of the Department of Commerce in the field of transportation. The President in his Message to the Congress transmitting Reorganization Plan No. 21 of 1950 (House Document No. 503, 81st Cong., 2d Sess.) cited the Organic Act of the Department, passed in 1903, which provided that it "shall be the province and duty of said department to foster, promote, and develop . . . the transportation facilities of the United States . . ." (5 U.S.C.A. 596). By that Plan the functions of the Maritime Commission were transferred to the Department of Commerce; and the new office of "Under Secretary of Commerce for Transportation" was created. In the above-mentioned Message transmitting the Plan, the President states that it is his purpose to look to the Secretary of Commerce (who is to have the assistance of such Under Secretary) "for leadership, with respect to transportation problems and for the development of over-all transportation policy within the Executive Branch." This Plan is now in effect. And thus a first step has been taken toward effectuating Recommendation No. 12 of the Hoover Commission's Report on the Department of Commerce, submitted March 1, 1949, "that the Secretary of Commerce be assigned the duty of making over-all route programs for air, land, and water transportation . . ." has been substantially put in effect.

#### SEPARATION OF SUBSIDY FROM COMPENSATORY AIR-MAIL PAY

This subject has become very active within the last year. Section 406 of the Civil Aeronautics Act of 1938 provides that the "need" of a carrier, with certain limitations, should be taken into consideration by the Civil Aeronautics Board in determining the rate of mail pay to be fixed. The President in his 1951 budget message to the Congress recommended the immediate

separation of "subsidy payments" from "mail compensation." (House Doc. 405, 81st Cong., 2d Sess.) The Hoover Commission's Report on the Post Office Department, submitted February 17, 1949, recommended separation; Governmental agencies, including the Department of Commerce, the Post Office Department, and the Civil Aeronautics Board have endorsed the broad principle of separation. (House Report No. 3041, 81st Cong., 2d Sess., 5). Different supporting reasons are involved for separation. It is urged that the taxpayer is entitled to know what is being paid as subsidy; that in this particular field the Post Office Department deficit should be reduced by the amount of subsidy (although, so far as is known, similar claims are not given much weight in fields where much larger subsidies in one form or another are borne by the mail service); and that by such separation air carriers will be given stimulus to get out of the subsidy class and become self sufficient.

Among those who embrace separation, there are two major divisions—those who believe that the separation should be made now by law if necessary and those who believe that the question, admittedly complex, should be studied. Perhaps, in the midst of uncertainties as to whether any of various Senate and House bills dealing with the matter will ever become law, the most realistic and tangible development is that in the General Appropriation Bill, 1951; H.R. 7786 (which has now been enacted into law) the sum of \$200,000 has been appropriated for the Senate Interstate and Foreign Commerce Committee to survey certificated interstate, overseas and foreign air carrier operations "with a view to drafting legislation requiring the separation of mail compensation from any Federal subsidy payments . . . ."

When the philosophical discussion reaches the point of action, certain hard (but manageable) facts must be faced. No definition of subsidy has been—perhaps no one definition can be permanently—agreed upon. It could be defined as any amount received by an air carrier for the transportation of mail which exceeds a "fair and reasonable rate" for that transportation. This definition, of course, leaves all of the problems unanswered. Even if that definition were agreed upon, it still would be necessary in fixing a fair and reasonable rate to determine what weight should be given to the cost to the carrier of transporting the mail, to the value of the air carriers' services to the Postmaster General and to the public, and to the effect of the development of passenger and cargo revenue upon the cost of mail service to the government. In determining costs to the air carrier, it would be necessary to allocate costs among the various classes of traffic—a difficult process which has long plagued rate-making agencies.

#### ACTIVITIES OF THE JOHNSON COMMITTEE

The Senate Committee on Interstate and Foreign Commerce, of which Senator Edwin C. Johnson of Colorado is Chairman, has taken leadership and has been continuously active in the field of air transportation since Senator Johnson became Chairman at the commencement of the 81st Congress.

Under Senate Resolution 50 (81st Cong., 1st Sess.) the Johnson Committee exhaustively investigated the operational efficiency and the financial stability of the entire airline industry. Hearings, begun on April 12, 1949, include the testimony of 79 witnesses. (Air-Line Industry Investigation, Hearings before the Committee on Interstate and Foreign Commerce, U. S. Senate, 81st Congress, 1st and 2d Sessions pursuant to S. Res. 50).

The Johnson Committee has taken a leading part in urging the separation of subsidy from the compensatory air-mail pay discussed above. It engaged the services of Ernst & Ernst who submitted a report as of Febru-

ary 1, 1950, on certain phases of the separation problem.<sup>3</sup> The committee undertook a study of airline "station" costs and on May 5, 1950, Senator Johnson presented to the Senate his "station" by "station" analysis of air-mail subsidy which, pursuant to a theory developed in the study, are required to support service to small cities on short hauls.<sup>4</sup> Senator Johnson recommended that government support to each airline over and above just compensation for the transportation of mail be specifically identified on a community service basis and be justified to Congress in the annual CAB request for an appropriation. Finally, the Johnson Committee has available the \$200,000 mentioned above for a study of the air-mail subsidy problem. The committee is taking steps to let contracts to implement the above-mentioned recommendation.<sup>5</sup>

#### TRUNK LINE—FEEDER LINE SERVICES

Great confusion surrounds the use of the words "trunk lines" and "feeder lines" as applied to domestic air carriers. Neither has ever been defined satisfactorily. Generally speaking, any carrier which was operating in 1938 when the Civil Aeronautics Act was passed is a "trunk line." The carriers which have been certificated during the past five years to provide local area services, are generally referred to as "feeder lines," although they may do but little "feeding" into trunk lines and although they conduct operations similar in many respects to local services conducted by many of the trunk lines.

Currently, one of the air transportation issues most discussed in the public press revolves around the question of whether long-haul high-density points (i.e., populous places which use air transportation extensively) should be segregated into one group of operators (Class I); and all other points assigned to another group (Class II).<sup>6</sup> Certain air carriers have voluntarily abandoned or suspended some light traffic points. (Abilene, Texas and Big Springs, Texas (American Airlines, Inc.), CAB Order Serial No. E-4585, September 1, 1950; Peoria, Illinois and Springfield, Illinois (Chicago & Southern Air Lines, Inc.), CAB Order Serial No. E-3488, October 27, 1949; and Green Bay, Wisconsin and Wausau, Wisconsin (Northwest Airlines, Inc.), CAB Order Serial No. E-4091, April 20, 1950). It is said that Class I could be self supporting even at fairly low rates; whereas Class II serving the thinly populated area could not. Subsidy is indicated here. The debate centers around the point, is this division good and in the public interest? Is it advisable to segregate profitable operations from unprofitable operations, so that the one will neither assist nor be dissipated by the other?

If a wise solution is to be achieved, some questions deserving careful consideration would seem to be: Will such a division promote air transportation effectively? Will the Class I operators who carry the bulk of the nation's air traffic volume be stronger financially under this arrangement? Will the higher cost of Class II operators be made up by subsidy or by rates paid by the public? Is it reasonable to expect that, if no such classification were made, the operator serving all of the points in an area would render adequate service to both heavy and light traffic points, or is it necessary to develop a special operator in order to secure adequate service to the light traffic points? Will the cost to the Class II user be higher than to the Class I

<sup>3</sup> See 17 J. AIR L. & COM. 86 (1950).

<sup>4</sup> See 17 J. AIR L. & COM. 333 (1950).

<sup>5</sup> See Johnson, "Proposed Senate Action on Air Mail Subsidies," 17 J. AIR L. & COM. 253 (1950), and Sweeney, "Identification of Air Mail Subsidy and Its Effect on Airline Communities," 17 J. AIR L. & COM. 459 (1950).

<sup>6</sup> See Lee, "The Planned Promotion of Feeder Air Transportation," 17 J. AIR L. & COM. 347 (1950).

user? Will new industry be willing to settle in Class II points? In the long run, will this classification tend to encourage or discourage the availability of air transportation as a nationwide distribution system? Eventually, will this arrangement of having two classes of operators cost the public, including the taxpayer, more or less than would be the case if one operator were required to serve all of the points in his area? If this classification results in low rates to the public for Class I operators and high rates for Class II, what will be the position of other forms of transportation toward the matter?

#### CIVIL AERONAUTICS BOARD'S ECONOMIC PROGRAM FOR 1949

This program was referred to in the committee's report. The action of the Civil Aeronautics Board in announcing this program was not repeated in 1950. The program was a substantial one as anyone who has examined it will see. Lack of adequate staff and of a system of priorities in a work schedule assigning the elements of this program to a high position can be cited as cause of the fact that it is far from complete.

#### INTERNATIONAL AIR TRANSPORT AGREEMENTS

Under the United States' policy, no bilateral agreement which it has made with a foreign country pools or assigns capacity to be operated among the operators between the United States and such country. Most bilateral agreements provide for consultation on this problem between the governments upon request. The first of such consultations has taken place between the United States and Brazil during the past year. This problem of how much capacity the operators of the countries to a bilateral agreement shall operate may become a very important one.

No further action has been taken on the proposition of establishing a multilateral world-wide convention on air routes since the failure of the Multilateral Commission at the Geneva Conference in the Fall of 1947.

#### WARSAW CONVENTION

The reason why the committee was required to report upon a limited phase of the Warsaw Convention; the committee's action thereon; and the action of the House of Delegates at the Midyear Meeting are set forth in the Midyear Proceedings February 27 and 28, 1950.<sup>7</sup> This Warsaw Convention will not be further considered for some time by the Legal Committee of the ICAO. It has been assigned a priority position next below the Rome Convention and the Convention on Aerial Collisions.

#### ROME CONVENTION

During the past year the Rome Convention (dealing with the subject of liability for damage caused to third persons or property on the surface by aircraft operated internationally) has received a great deal of attention and now ranks first in priority upon the agenda of ICAO's Legal Committee which meets in its Seventh Session in the Winter of 1950-51. At the Sixth Session of this Committee held in Taormina, Sicily early in 1950, it was thought that a "final" draft of this Convention had been achieved.<sup>8</sup> However, the Legal Commission of the 1950 Assembly of ICAO devoted its entire session to further revision on this Convention.<sup>9</sup> As so revised, it has

<sup>7</sup> See "Resolution of ABA Urging Strict Liability and Increased Liability Limits in Revisions of Warsaw and Rome Conventions," 17 J. AIR L. & COM. 225 (1950).

<sup>8</sup> For complete text see 17 J. AIR L. & COM. 194 (1950).

<sup>9</sup> For revised text see 17 J. AIR L. & COM. 328 (1950).

been referred again to the Legal Committee with the hope that it may be finalized at the next ICAO Assembly. In the meantime, the current draft emanating from the above-mentioned Legal Commission is being circulated to the member states of ICAO for comments which are to be in by November 1, 1950.

The important definition of the term "operator" upon whom liability is imposed; the question of the appropriate system of liability (the Taormina articles including an element of liability based upon fault); the question of what courts should have jurisdiction to adjudicate claims under the Convention or to grant execution on judgments rendered by the courts of other states; and what provisions should be in the Convention concerning insurance, are important matters which are up for further consideration.

#### CONVENTION ON AERIAL COLLISIONS

Next to the revised Rome Convention, the matter considered to be of the greatest urgency on the work program of the Legal Committee is the revision of the draft Convention on Aerial Collisions. The committee has recognized that certain aspects of the problem of aerial collisions are so closely related to the problem of damage on the surface that it will be necessary to give some consideration to the former before finalizing a revised Rome Convention.

#### LEGISLATION DEALING WITH CONTRACTS BETWEEN THE GOVERNMENT AND AIRCRAFT MANUFACTURERS

The committee reported last year a difficult problem which the aircraft industry faced through the applicability of both the profit limitation provisions of the Vinson-Trammell Act of March 27, 1934, as amended (34 U.S.C 495) and the renegotiation provisions of the Renegotiation Act of 1948 (Section 3 of P. L. 547, 80th Cong.). This question was eliminated by Section 622 of the National Military Establishment Appropriation Act, 1950 (P. L. 434, 81st Cong.) which provided that all negotiated contracts would be subject to the provisions of the Renegotiation Act and would not be subject to the Vinson-Trammell Act. Following the expiration of the Appropriation Act on June 30, 1950, this provision was carried forward in Section 618 of the General Appropriation Act, 1951, signed by the President on September 6, 1950.

#### PROTOTYPE AIRCRAFT LEGISLATION

For several years the aviation industry and the government have been concerned with the problem of providing for the development of new and improved transport aircraft—a jet transport, a more economical cargo aircraft, and a feeder line aircraft. It has seemed reasonably clear that these aircraft could not be designed and built entirely on the basis of financing by the airline and the manufacturer. After more than a year of study, the Administration proposed legislation during the current session of Congress which would provide for an appropriation over a five-year period of \$12,500,000 to provide for the testing and experimental modification of prototype transport aircraft. This testing would include the operation of an existing jet airplane in simulated scheduled transport service, in order to determine the operation, maintenance, and traffic control problems a jet would create—thus providing some guidance for the future design of new jet transport. This legislation, P. L. 867, was adopted during the present session.

Both aircraft manufacturers and air transport officials endorsed this legislation, but warned that while this modest program is a good first step,



it may not result in inspiring manufacturers to commit the millions of dollars necessary to develop a new transport. Airline officials have pointed out that unless some solution is found to this problem, it may be necessary for them to look to British and Canadian manufacturers for the jet transports they will need to maintain the development of our domestic air transport service and to meet foreign competition.

#### COOPERATION WITH THE UNITED STATES AIR COORDINATING COMMITTEE

The Air Coordinating Committee (ACC) is the agency charged with developing the position of the United States on aviation questions involving several governmental agencies. The ACC has, throughout the past years, submitted numerous questions to the Committee on Aeronautical Law and to the Associate and Advisory Committee for comment and suggestion. All of these questions have been circulated among the members of the committee and each comment or suggestion received has been made available to the ACC, not as committee action but as the views of the individual member. We are advised by the ACC that this procedure is satisfactory and that the comments and suggestions are useful and are valued by the ACC. This procedure permits those members of the Aeronautical Law Committees who are alert to take advantage of this opportunity to make their views available in a manner permitting them to be effective. It is expected that this cooperative arrangement will continue.

Respectfully submitted,

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### REPORT TO THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK OF SUBCOMMITTEE ON THE WARSAW CONVENTION ADOPTED AND APPROVED BY THE COMMITTEE ON AERONAUTICS, MAY 9, 1950

*Should the Warsaw Convention be denounced by the United States because of the level of the limits of liability prescribed therein for the death or personal injury of a passenger?*

#### BACKGROUND AND PURPOSE OF THE WARSAW CONVENTION

**T**HE purpose of the Warsaw Convention<sup>1</sup> is to establish uniform rules relating to the liability of carriers by air to their passengers and shippers in international transportation. Such uniformity is not only of benefit to the carrier in enabling it to appraise its risks, but is of benefit to passengers and shippers who might otherwise be subjected to various rules of liability in connection with the same journey or shipment. In view of the speed of modern aircraft and the number of countries which may be transited on a single journey, the law applicable to any passenger's injury or shipper's loss

<sup>1</sup> Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw on October 12, 1929.

might, and sometimes does, shift many times within a few hours in the absence of some uniform rules. These differences concern not only the rules as to existence of liability itself but many related matters such as, for example, limitation of actions. Recovery for the same injury arising from the same cause might vary from zero to many thousand dollars, depending upon the fortuitous circumstance of where the accident occurred, which might itself be difficult to determine.

As an illustration of the extreme differences in rules of liability in various countries, in the United Kingdom a carrier is permitted to contract out of all liability for injury to passengers, regardless of how the injury may be caused.<sup>2</sup> On the other hand, in most, if not all, jurisdictions in the United States, any such contract would be held to be against public policy. In some jurisdictions it would be invalid under any circumstances. In others it is valid only if the passenger is afforded a choice of rates under which he may contract for unlimited liability. In the absence of statute, liability in the United States, for personal injury or death, is in general based upon fault, which must be proved by the plaintiff. This is subject to varying applications and interpretations of the *res ipsa loquitur* rule. In civil law countries, liability in connection with air transportation is generally governed by statutory provisions, some of which apply generally to all accidents, some to carriers of all classes, and some to air carriers specifically. Many of these rules are obscure and difficult to interpret. Recently Costa Rica and Mexico adopted a rule of absolute liability of an air carrier to its passengers, this being applicable only domestically in the case of Costa Rica.

Not only are the rules of liability different in different countries, but the amounts of recovery may vary to a considerable extent. In the United States, for example, a number of States have limited the amount of recovery in cases of wrongful death. A recent survey showed that 16 States, plus the District of Columbia and Alaska, had established such limits, which varied from \$5,000 to \$20,000, with a \$10,000 limit being established in 10 of the jurisdictions referred to. In Brazil the Air Code sets a limit of Cr\$100,000 (approximately \$5,000 U.S. Currency) per passenger injured or killed in domestic air transportation in that country. In Mexico, until recently, a regulation issued under the Communications Law provided that, if an air carrier had passenger accident insurance in the amount of 5,000 pesos per passenger (approximately \$600 U.S.) covering accidents to passengers in domestic transportation, the air carrier had no further liability to such passengers. Through a recent statutory amendment, Mexico now imposes absolute liability of 50,000 pesos for death of a passenger in domestic air transportation, with greater liability up to 75,000 pesos if the carrier fails to prove that it took all reasonable precautions or that it was impossible to take such precautions, and unlimited liability if wilful misconduct (*dolo*) is established. Apart from statutory limitations, amounts recovered vary considerably as between countries, depending largely upon their individual economic development. As contrasted with other types of rules referred to, certain northern European countries follow a rule under which the recovery in case of wrongful death is measured by the benefit which the heirs or next of kin receive from the estate of the deceased. Thus, recoveries are very limited where large estates are involved.

The Convention, which was finally adopted at a Conference on Private Air Law, held in Warsaw in 1929, necessarily involved a compromise between the rules in effect in the various countries. Those having the highest limits of liability could not have expected all other nations to accept such limits as the standard indemnity, and vice versa. From the point of view of the United States it will be seen that, while the Convention which was adopted

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<sup>2</sup> *Luditt v. Ginger Coote Airways, Ltd.*, 1947 USAvR1; *McKay and Craigie v. Scottish Airways, Ltd.*, 1948 USAvR79.

did permit a carrier to limit its liability, the rule in effect requires the defendant to prove absence of fault. In practice this comes very close to absolute liability. Recovery is thus made possible in some instances where an injured passenger might otherwise be unable to recover because of absence of proof.<sup>3</sup>

At the present time there are 34 countries which are adherents to the Warsaw Convention. These include the United States (which adhered to the Convention in 1934) and Great Britain, as well as most of the European countries. Among the Central and South American countries, the only adherents are Mexico and Brazil. The belief has been expressed in quarters close to the subject that the limit of liability has been a deterrent to other Latin American countries from becoming parties to the Convention, because it is relatively high as to them. A number of countries which have adhered to the Convention have incorporated it into their domestic law. These include most of the Northern European countries, Italy and Greece. Brazil has incorporated the principles of the Convention into its law with respect to domestic transportation but with limits of liability at present considerably lower than the Warsaw limits.

#### CLAIMS AND LITIGATED CASES ARISING UNDER THE CONVENTION IN THE UNITED STATES

So far as the subcommittee has been able to determine, there have been no published statistics on the number of claims for passenger death or injury which have arisen in the United States and to which the Convention was applicable. However, the subcommittee is reliably informed that there have been roughly 400 such claims of which all but some 10% have been settled without litigation. Of those in which litigation was commenced, it would appear that nearly all have been settled after preliminary or motion proceedings only.

This subcommittee has found only six cases that have reached trial. In each of these cases "wilful misconduct"<sup>4</sup> was put into issue by the plaintiff in an effort to recover more than the Warsaw limit. In two cases the jury returned a verdict for the defendant on this issue. In the third case there was a disagreement by the jury 9 to 3 in favor of the defendant. Recently in a fourth case a jury returned a verdict in favor of the defendant on the issues both of negligence and "wilful misconduct." In a fifth case a motion by the defendant for a directed verdict at the Warsaw limit was granted at the end of plaintiff's case. And in only one of these six cases was a verdict on the issue of "wilful misconduct" returned by the jury in favor of the plaintiff. This verdict in the sum of \$25,000 for personal injuries was affirmed on appeal.

The relatively low proportion of litigated claims<sup>5</sup> is believed to be due

<sup>3</sup> See *Wyman and Bartlett v. Pan American Airways, Inc.*, 181 Misc. 963; aff'd 267 App. Div. 947; aff'd. 293 N.Y. 878; Cert. den. 324 U.S. 882, involving loss of an aircraft at sea without trace.

<sup>4</sup> "Wilful misconduct" is a translation of the French word 'dol,' for which there is no exact counterpart in our language and which has had conflicting interpretations.

<sup>5</sup> Some cases of interest, including the six referred to above, are: *Wyman v. Pan American*, 181 Misc. 963, aff'd. 293 N.Y. 878, cert. den. 324 U.S. 882, 1943 USAvR1; *Garcia v. Pan American*, 269 App. Div. 287, aff'd. 295 N.Y. 852, cert. den. 329 U.S. 741, 1945 USAvR39; *Grein v. Imperial Airways*, 1 K.B. 50, 1936 USAvR211; *Indemnity Insurance Co. v. Pan American*, 58 F. Supp. 338 (SDNY); *Sheldon v. Pan American*, 190 Misc. 539 (Sup. Ct., N.Y. Co.); *Ross v. Pan American*, 299 N.Y. 88; *Ulen v. American Airlines*, 1948 USAvR161; *Choy v. Pan American* (not officially reported); *Alpert v. American Overseas Airlines* (not officially reported); *Reitz v. American Airlines* (not officially reported); *Weil v. T.W.A.* (not officially reported); *Peckelis v. T.W.A.* (not officially reported); *Garcia v. Pan American*, 274 App. Div. 996 (2d Dept., 1948), 1948 USAvR622.

in large part to the fact that on the one hand the insurance carriers generally have been willing to pay up to the Warsaw limit because of the extensive proof required that the air carrier has taken "all necessary measures to avoid the damage," and on the other hand that the claimants have generally been willing to accept the Warsaw limit because of the difficulty and expense of proving "wilful misconduct."

#### RECENT DEVELOPMENTS

Numerous technical suggestions have been made for revision of the Convention, but this report deals only with those relating to the limit of passenger liability.

The Warsaw Convention in exchange for limitation of the amount of recovery against the carrier (in the absence of wilful misconduct) provides for the uniform application of presumptive liability of the carrier on all international transportation between Warsaw countries notwithstanding their national legal systems.

Evaluation of this exchange requires some comparison with domestic standards. As noted, about one-third of the states impose limits for wrongful death averaging about \$10,000. We are informed that the average air fatality settlement in the United States as a whole in the last few years has been about \$12,000. Although there appear to be no domestic statutory limitations on recovery for personal injuries, the point has been made that the average limit of recovery under the Workmen's Compensation Acts is less than under the Warsaw Convention.

On the other hand, there are instances where limiting recovery by dependents in death cases to \$8,300 works severe economic hardship. Apart from the pain and suffering involved many non-fatal injuries are extremely serious requiring expensive and protracted treatment, and many others are permanently crippling. The resulting economic loss to the passenger and his dependents can thus be very substantial.

These hardships in many cases could be overcome by purchase of individual insurance which is now available. The availability of such insurance is offset by the fact that the average passenger does not know that liability is limited and the type of insurance generally offered does not cover injury except for dismemberment.

The International Civil Aviation Organization (I.C.A.O.) of which 56 nations are currently members, for the last few years has been considering revision of the Convention. The United States' representatives on the Legal Committee of I.C.A.O. at its Fourth Session at Montreal in June 1949 supported an increase in the Warsaw limit.

The following is a summary of Replies to a Questionnaire and of voting at Montreal on the subject of increasing the limits of liability:

##### *Questionnaire 1*

- (a) In favour of maintaining the existing limits for passengers, baggage and freight: Australia, Belgium, Czechoslovakia, Denmark, Finland, France, Italy, Holland, Siam, Switzerland, Union of South Africa, Venezuela.
- (b) In favour of maintaining the existing limits for baggage and freight only: Canada, United Kingdom, U.S.A.

##### *Questionnaire 2*

In favour of increasing the limits:

Greece (slightly).

United Kingdom (a moderate increase for death or injury)

Sweden and U.S.A. (same as United Kingdom provided that all the existing Contracting States were agreeable).

Canada (double the limits but with the same reservation as Sweden and the U.S.A.).

Ireland, New Zealand, Mexico and Brazil (double limits for passengers but not for freight).

Norway proposed that the present limits should be retained but that in case of death the limit should be automatically payable regardless of the actual damage caused and that the limits should be calculated at the rate of \$35 U.S.A. per ounce of fine gold.

*Details of voting at Fourth Session of the Legal Committee*

(a) On a proposal to double the limits for bodily injury not resulting in death.....	For 4	Against 8
(b) On a proposal to increase such limits by 25%.....	For 6	Against 8
(c) On a proposal to double the limits for death or permanent disablement .....	For 3	Against 12
(d) On a proposal to increase such limits by 25%.....	For 7	Against 8

The I.C.A.O. Legal Committee reporter on revision of the Warsaw Convention has in a Fourth Draft recommended separation of death and personal injuries and an increase in the limits.

It would also be of interest to mention a report dealing with the subject of liability of domestic carriers published by the Civil Aeronautics Authority in 1941. This report (known as the Sweeney Report) recommended that with respect to fatalities there be a minimum recovery of \$2,500 and a maximum of \$15,000 or \$20,000 and scheduled compensation in the event of personal injuries. Liability was to be presumptive as under the Warsaw Convention.

In 1944 Congressman O'Hara introduced a bill for the regulation of liability of air carriers and foreign air carriers otherwise not subject to the Warsaw Convention. It provided for presumptive liability with a death limit of \$10,000 and a personal injury limit of \$50,000. The bill was never reported out of Committee.

#### RECOMMENDATION

The summary above given serves to bring into focus the question whether the limit of liability under the Warsaw Convention is too low and whether the United States should denounce the Convention for that reason.

After weighing the points above discussed, this Subcommittee makes the following recommendations:

1. The Convention should not be denounced as that would undo what has been a constructive forward step in International Aviation Law.
2. The liability limits should be increased to the extent that an increase would not provoke any withdrawals from the Convention, or deter adherence thereto by additional countries.
3. Claims for personal injury should be treated separately from death claims and different limits should be placed on each category.
4. In the meantime, a program should be encouraged which would acquaint passengers with the liability limitations of the Convention and the availability of insurance coverage for themselves.

Respectfully submitted,

Subcommittee on the Warsaw Convention  
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GILBERT KERLIN  
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